Supreme Court, U.S.
FILED
JUN 27 1991
OFFICE OF THE CLERK

(2)

No. 90-1818

In The

Supreme Court of the United States

October Term, 1990

MITZI BEVERS,

Petitioner,

v.

CAMILLE DELOACH,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

FOR RESPONDENT:

STEVEN M. ANGEL*
LAW OFFICES OF STEVEN M. ANGEL
50 Penn Place, Suite 825
Oklahoma City, OK 73118
(405) 848-0286

CARL D. HUGHES
HUGHES & NELSON
5801 N. Broadway Ext.
Suite 302
Oklahoma City, OK 73118
(405) 848-0111

*Counsel of Record *Attorneys for Respondent*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

17

ISSUES PRESENTED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

1. The petition for writ of certiorari should not be granted inasmuch as the petition fails to raise issues which would justify the court exercising its discretion.

2. The petition for writ of certiorari should not be granted inasmuch as the petition raises issues not preserved below.

TABLE OF CONTENTS

Page

ISSUES PRESENTED IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 4

THE PETITION FOR WRIT OF CERTIORARI FAILS TO IDENTIFY ANY SUBSTANTIAL BASIS FOR EXERCISE OF THE COURT'S DISCRETION 4

A. Absence of Conflict 5

B. Factual Issues 6

(1) Proposition I: The Lack of Probable Cause 6

(2) Proposition II: Effect of the Preliminary Hearing 8

(3) Proposition III: Good Faith Immunity 10

THE PETITIONER SEEKS TO RAISE MATTERS NOT PRESERVED BELOW 12

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES:

Cahill v. New York, N.H. & N.R. Co., 351 U.S. 183 (1956) 5

Malley v. Briggs, 475 U.S. 335 (1986).....5, 7, 9 10, 12

National Labor Relations Board v. Hendricks County Rural Electric Corporation, 454 U.S. 170, 176 n. 8 (1981) 6

Ross v. Moffitt, 417 U.S. 600, 616-617 (1974)..... 4

United States v. Johnson, 268 U.S. 220, 227 (1925)..... 6

TEXTS:

R. Stern & E. Gressman, *Supreme Court Practice*, 7th Ed., BNA, Sec. 4.5..... 5

S. Baker, *A Practical Guide to Certiorari*, 33 Cat. U. L. Rev. 611, 617 (1984)..... 5

No. 90-1818

In The

Supreme Court of the United States

October Term, 1990

MITZI BEVERS,

Petitioner,

v.

CAMILLE DELOACH,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

Respondent, Camille Deloach, respectfully prays that the court deny the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in this proceeding[1]

[1] The respondent would note, in accordance with Rule 15 of the Rules of the United States Supreme Court, that Appellant did not provide the information required by Rule 14.1(e)(i) & (ii). Respondent would show that the judgment of the Court of Appeals for the Tenth Circuit was rendered on December 31, 1990. A petition for rehearing was filed and denied on February 25, 1991.

STATEMENT OF THE CASE

The decision by the Tenth Circuit accurately sets forth the facts upon which the jury in this case rendered judgment in favor of respondent Camille Deloach. In summary, the case arises from the investigation into the death of eighteen-month old Ryan Swift. After the child's death, the respondent, Camille Deloach, was contacted by the investigating officer, petitioner Mitzi Bevers. When respondent Deloach insisted upon her right to counsel during the investigation, petitioner Bevers became convinced that Deloach was guilty[2] and thereafter took repeated actions to insure the prosecution and conviction of respondent.

In conducting her investigation, petitioner Bevers learned, from the District Attorney's chief expert in such cases, that the most likely suspect was the parents, not Camille Deloach, the babysitter. Bevers also learned from this same expert that the blow which caused the death of

---

[2] In this regard, the evidence showed that at the time Camille Deloach elected to hire counsel, Bevers informed her husband, ominously, that this was "not being very cooperative". Moreover, at the time of arrest, Bevers stated to another police officer attempting to arrange for a voluntary surrender, that "Paybacks are hell, that's what she got for hiring a smart ass lawyer". Bevers, admitting that she stated "paybacks are hell" asserts she was referring to a failure to cooperate. The sole failure to cooperate was the fact that Deloach had hired counsel.

Ryan Swift had most likely occurred at a time before the child was placed in the babysitter's custody[3].

Bevers testified that she was well aware of the procedure for prosecution in such capital cases. After hearing from the District Attorney's expert, she withheld a report to be included in the investigative file for use by the District Attorney[4]. Moreover, Bevers testified[5] that at the time of the original investigation, she knew she did not have sufficient "probable cause" to charge Camille Deloach. Thereafter, she executed an affidavit of probable cause which contained, by her own admission, false and misleading information.

Respondent, Camille Deloach, was arrested and brought before a magistrate at a preliminary hearing. At this hearing, Bevers, by her own admission, falsely testified with respect to her meeting with the District Attorney's expert, Dr. Stuemke. Thus, as noted by the Tenth Circuit, "[w]hen Bevers testified at the preliminary hearing, she completely mischaracterized the substance of the interview and Dr. Stuemke's opinion, avoiding any exculpatory implications". It is significant that the Assistant

---

[3] This expert, Dr. John H. Stuemke, testified that from his observation, Bevers had already decided the guilty party was the respondent Deloach and that Bevers was not giving any credence to his opinion because it differed from her own predisposition.

[4] This was the only interview she conducted which was not reduced to a report and included in the investigative file.

[5] In deposition, which was read to the jury at the time of trial.

District Attorney assigned to the case testified that had his office known of Dr. Stuemke's opinion before the arrest, Camille Deloach would not have been prosecuted.

REASONS FOR DENYING THE WRIT

THE PETITION FOR WRIT OF CERTIORARI FAILS TO IDENTIFY ANY SUBSTANTIAL BASIS FOR EXERCISE OF THE COURT'S DISCRETION

This petition is one which inevitably turns upon an evaluation of the specific facts of the case. The petitioner seeks to invoke this court's discretionary jurisdiction simply because she disagrees with the adjudication of those facts under well established law. In essence, petitioner appears to invoke this court's jurisdiction solely to correct a perceived error in the lower courts' decisions. As noted by Justice Rehnquist, in *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974), "[t]his Court's review . . . is discretionary and depends upon numerous factors other than the perceived correctness of the judgment we are asked to review"

Petitioner has identified three issues as a basis for review. However, in identifying these issues, the petitioner has failed to demonstrate a justification for exercise of this court's discretionary jurisdiction. The petitioner has not suggested that the decision in this case directly conflicts with either the decisions of this court, or decisions of other courts of appeals. Furthermore, the matters brought before the court involve no important constitutional issues but, rather, are merely attempts to obtain a review of factual matters passed upon by the courts below.

A. Absence of Conflict

This court has promulgated Rule 10 to provide guidance as to when the writ for certiorari will be granted. One key factor is when there exists a direct and substantial conflict between the decision below and a prior decision of the Supreme Court, or decisions of other courts of appeals. With regard to the former, in order to justify a grant of certiorari, "the conflict must truly be direct and must be readily apparent from the lower court's rationale or result"[6]. With respect to the latter, the conflict must be of such a nature as to create an intolerable conflict among the nation's lower courts[7].

In this case, petitioner asserts no direct or substantial conflict which would justify this court's granting the extraordinary writ. In fact, no such conflict exists. The

---

[6] R. Stern & E. Gressman, *Supreme Court Practice*, 7th Ed., BNA, Sec. 4.5.

[7] S. Baker, *A Practical Guide to Certiorari*, 33 Cat. U. L. Rev. 611, 617 (1984), Stern & Gressman, *Supreme Court Practice, supra*, at Sec. 4.3. In addition, mere conflict may not be sufficient. That is, the conflict must be concerning a significant matter. The importance of this case is presently in question because the judgment from which the appeal is taken has been satisfied from an appeal bond posted by defendant. This bond was foreclosed upon when, after the Tenth Circuit denied rehearing, both the district court and the Court of Appeals, denied a stay of execution on the bond. Petitioner did not seek a stay of execution before this court. In light of *Cahill v. New York, N.H. & N.R. Co.*, 351 U.S. 183, 184 (1956) this may not render the controversy moot. At the very least, it calls into question the importance of the issues raised by petitioner.

decision of the court below is consistent with *Malley v. Briggs*, 475 U.S. 335 (1986) and it's progeny.

B. Factual Issues

At the heart of petitioner's argument is the disagreement with the facts as found by the jury and upheld by the Tenth Circuit. Throughout her petition factual disputes are urged as a basis for granting the writ. The undersigned would submit that it is inappropriate to grant the petition where, as here, the petitioner merely seeks to have the court review the evidence and discuss specific facts, *United States v. Johnson*, 268 U.S. 220, 227 (1925), *National Labor Relations Board v. Hendricks County Rural Electric Corporation*, 454 U.S. 170, 176 n. 8 (1981).

(1) Proposition I: The Lack of Probable Cause

Petitioner's first argument is that the Tenth Circuit created an improper extension of Supreme Court law. However, it is clear that petitioner's argument is centered upon a disagreement with the application of well established law to the specific fact situation of this case.

The law to which petitioner refers is the standard set in *Malley v. Briggs, supra*:

> [T]he analogous question in this case is whether a reasonably well-trained officer in petitioner's position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant [footnote omitted]. If such was the case, the officer's

> application for a warrant was not objectively reasonable, because it created the unnecessary danger of an unlawful arrest. . . . We find it reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment.

The Tenth Circuit noted that this determination is inherently one of *fact* [see discussion at App. p. 12 of appendix to petition for writ of certiorari]. Indeed, petitioner does not attack the unassailable conclusion that the issue of probable cause is one of fact. Rather, petitioner urges that the Tenth Circuit impermissibly extended the *Malley* decision by allowing a civil rights plaintiff to recover simply because of omissions from the affidavit of probable cause.

Petitioner's assertion in this regard is misplaced. The Tenth Circuit did not extend *Malley* Rather, in applying *Malley* to the specific facts situation of this case, they concluded, as did the jury, that a reasonable police officer would not have acted as did the petitioner.

In this regard, the Tenth Circuit carefully set forth the standard under which the instant facts were to be assessed. Specifically, as established by *Malley* and its progeny, a judicial finding of probable cause based upon information the officer knew to be false or would have known to be false had he not recklessly disregarded the truth, violates the Fourth Amendment. The Court specifically noted that "omissions as well as affirmative misstatements" may destroy a finding of probable cause "if the omissions are so probative they would vitiate probable cause". The Tenth Circuit then itemized the misstatements and crucial omissions from petitioner's affidavit of probable cause. However, the court was careful to note:

> Not all errors and omissions will negate probable cause, of course, and not all evidence known to the officer need be included in every affidavit used to secure an arrest warrant. But in the case of omitted evidence it is not enough to ask simply whether the truthful statements included in the affidavit are themselves sufficient to support a probable cause finding; the court also must ask if inclusion of the omitted material would negate probable cause.

The petitioner argues that the facts in the present case show that the omission was not sufficiently material to vitiate probable cause. Moreover, there were sufficient facts, including petitioner's own admissions, to demonstrate false and misleading statements of such a nature as to undermine any finding of probable cause.

In any case, the undersigned would submit that petitioner's argument is nothing less than an attempt to have this court substitute its judgment for that of the trier of fact. A close reading of the Tenth Circuit's decision shows no departure from well established precedent. The decision merely recognizes that, in this case, there were sufficient facts to justify the jury verdict in favor of respondent, Camille Deloach.

(2) Proposition II: Effect of the Preliminary Hearing

Petitioner's second point of error also urges this court to make factual determinations. The essence of petitioner's argument is that a finding by an independent judicial officer of probable cause, after the arrest, insulates the arresting officer from liability. On its surface, this appears to be an invitation to the court to reverse the

specific holding of *Malley v. Briggs, supra*[8], by determining that a determination of probable cause would insulate an officer from liability[9].

It is submitted, however, that the court need not reach the question of the impact of a fair and full preliminary hearing on an otherwise unconstitutional arrest.

---

[8] In *Malley* the court stated:

> [P]etitioner insists that he is entitled to rely on the judgment of a judicial officer in finding that probable cause exists and hence issuing the warrant. This view of objective reasonableness is at odds with our development of that concept in Harlow and Leon. In Leon, we stated that "our good-faith inquiry is confined to the objectively ascertainable question whether a reasonably well-trained officer would have known that the search was illegal despite the magistrate's authorization" 468 U.S. at___, n.23, 104 S.Ct. at 3421, n.23. . . . It is true that in an ideal system an unreasonable request for a warrant would be harmless, because no judge would approve it. But ours is not an ideal system, and it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should. We find it reasonable to require the officer applying for the warrant to minimize this danger by exercising reasonable professional judgment.

475 U.S. at 345, 106 S.Ct. at 1098. At footnote 9 the court further noted that the officer could not excuse his own conduct by pointing to the greater incompetence of the magistrate.

[9] Respondent would note that petitioner's argument with respect to collateral estoppel was not raised in the district court or in the initial issues on appeal. The undersigned would urge that since petitioner did not preserve this argument below, the court should not entertain it at the present time.

That is, in this case, the evidence below demonstrates that respondent Deloach did not have a full opportunity to litigate the issue of probable cause at the preliminary hearing because petitioner Bevers effectively committed fraud in advance of, and during, the preliminary hearing.

As petitioner concedes in her petition, the preliminary hearing provides no shield to the *Malley v. Briggs* claim where evidence shows that the officer "knowingly acted or failed to act in such a way as to perpetuate a fraud on the court" [see statement of proposition II to petition for writ of certiorari]. The jury found, and the Tenth Circuit affirmed, that the petitioner had effectively perpetuated a fraud on the court. Thus, the Court of Appeals stated:

> [W]hen Bevers testified at the preliminary hearing, she completely mischaracterized the substance of the interview and Dr. Stuemke's opinion, avoiding any exculpatory implications. When the district attorney's office consulted Dr. Stuemke shortly before Deloach's trial, it was his opinion that convinced them to dismiss the charges against Deloach. Indeed, Assistant District Attorney Deason testified that if Dr. Stuemke's opinion had been known before Deloach's arrest, she would not have been arrested.

Petitioner's argument in this respect is simply a disagreement with the facts presented in the case. This court should decline the invitation to relitigate those factual matters.

(3) Proposition III: Good Faith Immunity

Petitioner's third point of error is also an attempt to relitigate factual matters. While making the argument

that the law was not well established, petitioner simply invites this court to reconsider the facts of the case. That is, the petitioner urges that she could not have known that her actions would subject her to liability. Such an argument is belied by the findings of fact in this case. Not only was the law well established[10], but it was clear from the admissions of petitioner that she knew what she was doing and was intent on inflicting harm on respondent. Thus, as succinctly described by the Tenth Circuit

> This is a tragic case. Bevers admitted that she made up her mind that Deloach, the babysitter, was guilty of murder shortly after her first interviews with the three principal suspects – Deloach and the child's parents. She apparently never waivered from that belief, and a jury could believe it very much affected her actions thereafter that she took Deloach's hiring of a lawyer as evidence of guilt; that she did not pay attention to Dr. Stuemke's opinions because the doctor did not agree with her views . . . ; that she deliberately failed to record Dr. Stuemke's views to prevent the defense lawyer from obtaining that exculpatory information; and that when the district attorney decided to file the case and Bevers was asked to prepare an affidavit, she deliberately slanted the facts by misstatements and omissions to help persuade the magistrate to issue the warrant. . . . [a]ccepting the jury's findings as true, what Bevers did is totally unacceptable behavior for an investigative officer. Impelled by her own bias to slant the evidence, she improperly hindered the others whom the law supposes will make impartial determinations – the district attorney and the magistrate – before Deloach is required to

---

[10] See discussion by the Tenth Circuit at App. pg. 4.

undergo the ordeal of arrest and trial for first degree murder.

Accordingly, respondent would urge that the petition for writ of certiorari be denied.

THE PETITIONER SEEKS TO RAISE MATTERS NOT PRESERVED BELOW

The points of error raised by petitioner were clearly not preserved below. Specifically, the claim of collateral estoppel[11] and good faith immunity[12] were not preserved in the district court. Indeed, the petitioner's initial argument, asserting an erroneous extension of *Malley* is directly addressed by petitioner for the first time before this court.

With respect to each argument raised by the petitioner, the argument was not raised by motion, requested instruction, or objection to instruction before the district court. Moreover, these issues were only tangentially addressed before the Court of Appeals. Accordingly, the

---

[11] Petitioner did assert below that the preliminary hearing determination was evidence of good faith. However, prior to the trial of this matter, petitioner did not raise the affirmative defense of collateral estoppel by motion or otherwise. Only on appeal was this issue addressed.

[12] Petitioner did raise a claim of good faith immunity under *Malley v. Briggs*, 475 U.S. 335 (1986) and did assert that she was, at all times acting in good faith. However, she did not raise, until this petition, an assertion that the law of prohibiting retaliation under the First Amendment was not well established.

undersigned would submit that these arguments have been waived.

CONCLUSION

Based on the foregoing, the respondent would urge that the petition for rehearing be denied.

Respectfully submitted,

STEVEN M. ANGEL*
LAW OFFICES OF STEVEN M. ANGEL
50 Penn Place, Suite 825
Oklahoma City, OK 73118
(405) 848-0286

CARL D. HUGHES
HUGHES & NELSON
5801 N. Broadway Ext.
Suite 302
Oklahoma City, OK 73118
(405) 848-0111
*Counsel of Record *Attorneys for Respondent*